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No. 81-2292

In the Supreme Court of the United States

OCTOBER TERM, 1982

AIR EXPRESS INTERNATIONAL CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly found that the relocation of the employer's operations to another nearby facility did not constitute "unusual circumstances" permitting the employer to question the union's majority status during the certification year.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-14) is reported at 659 F.2d 610. A supplemental opinion (Pet. App. B-1 to B-2) is reported at 670 F.2d 512. The decision and order of the National Labor Relations Board (Pet. App. C-1 to C-99) are reported at 245 N.L.R.B. 478.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1982 (Pet. App. B-1 to B-2). The petition for a writ of certiorari was filed on June 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a nationwide air freight forwarding business that transports commodities both do-

mestically and internationally (Pet. App. A–2, C–15). In June 1977, the union[1] filed an election petition seeking to represent dockmen, drivers and agents working at petitioner's facility located in East Point, Georgia, adjacent to the Atlanta airport (*id.* at C–18). Petitioner responded to the union's organizing drive by announcing a wage freeze, by discharging an employee for union activities, and by threatening employees with plant closing and discharge in the event the union won the election (*id.* at A–3 to A–5). The union nevertheless won the election by a vote of 5 to 1 (*id.* at C–18). Petitioner thereafter filed election objections that were overruled by the Board and the union was certified as the bargaining representative on December 14, 1977 (ibid.).

About one month before certification issued, petitioner notified the union that it had entered into an agreement to purchase the facilities and assets of Trans-Air Freight System, Inc., another air freight forwarding company operating in fifteen cities, including Atlanta. Petitioner further advised the union that it was considering relocating its existing Atlanta facility to the Trans-Air facility, which was located on the opposite side of the airport in College Park, Georgia, a distance of approximately 7 to 10 miles from East Point (Pet. App. C–69 to C–70). Formal bargaining sessions between petitioner and the union began on January 4, 1978, and the parties thereafter met on several occasions to discuss the relocation (*id.* at C–69 to C–72). On February 10, 1978, following notification that the Civil Aeronautics Board had approved the Trans-Air acquisition, petitioner moved its Atlanta operations to the new facility (*id.* at C–56). At the same time, petitioner discharged the five active union supporters among its bargaining unit employees. Petitioner hired all the former

[1] Truckdrivers and Helpers Local Union No. 728.

Trans-Air employees and transferred its two remaining bargaining unit employees as well as its entire sales and supervisory staff to the new facility (*ibid.*).[2] The daily operations of petitioner's Atlanta facility remained substantially unchanged following the relocation; petitioner retained the same customers, continued to service the Atlanta airport, and its employees maintained the same job classifications and continued to do essentially the same work as before (*id.* at C–91). After the relocation, petitioner withdrew recognition and refused to bargain with the union as representative of the employees at the new location (*id.* at C–73).

2. The Board found (Pet. App. C–1 to C–4, C–92) that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) by withdrawing recognition and refusing to bargain with the union as representative of the relocated bargaining unit and it ordered petitioner to bargain with the Union.[3] Adopting the decision of the administrative law judge, the Board found that "the College Park facility constituted a continuation of the East Point operation," and it therefore

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[2] Of the 15 cities in which petitioner consolidated its operations with those of Trans-Air, Atlanta was the only location where petitioner discharged full-time employees in favor of Trans-Air employees (Pet. App. C–59).

[3] The Board also found that petitioner violated Section 8(a)(5) by failing to bargain in good faith prior to the relocation (Pet. App. C–78 to C–79); Section 8(a)(1) by, *inter alia*, threatening employees with discharges and plant closures, interrogating employees regarding union activities, promising wage increases to discourage union support, and soliciting employees not to cooperate with the Board's investigation of the case (*id.* at C–94, C–97 to C–98); and Section 8(a))(3) and (1),of the Act, 29 U.S.C. 158(a)(3) and (1) by discharging employees because of their union activities and in order to avoid its bargaining obligation (Pet. App. C–31, C–64). Petitioner does not contest these findings or the Board's remedial reinstatement order (Pet. 6–8).

concluded that the union's certification at East Point covered the employees at College Park (Pet. App. C–91 to C–92; footnote omitted):

> Both [facilities] were located in the same area, serving the Company's customers through the same airport, functioning in the same manner and performing the same work with the same categories of employee personnel. Absent the discriminatory conduct, the Company would have continued its operation with substantially the same complement of employees. * * * Neither the change in location, nor the increase in size of the employee complement, nor the fact that the district manager reports to a Regional Manager in Charlotte, rather than to one in Pittsburgh, constitute the kind of "unusual circumstances" which operate to overcome the conclusive presumption of representative status. A change in location within the same metropolitan area does not vitiate a certification, even when the certification specifically refers to the original location, or even if the employer relocates to a larger facility which may necessitate a larger employee complement.

3. The court of appeals upheld the Board's decision and enforced its order.[4] Relying on *Brooks* v. *NLRB*, 348 U.S. 96 (1954), the court noted that "[c]ertification carries with it an entitlement to one year's presumptive majority status, a presumption irrebuttable absent 'unusual circumstances'" (Pet. App. A–6). The court rejected petitioner's contentions that its restructured regional organization, altered mix of domestic and international business, and physical move of 7 to 10 miles

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[4] The court of appeals made only one minor modification of the Board's order. The court found that the bargaining order should not be retroactive to January 4, 1978, the date of the first failure to bargain in good faith, but rather just to February 11, 1978, when petitioner withdrew recognition from the union (Pet. App. A–13).

amounted to unusual circumstances (*id.* at A–7 to A–8). "College Park is a continuation of East Point" (*id.* at A–12). The court also agreed with the Board that petitioner could not rely on the fact that, because they were unlawfully discharged, a majority of the unit employees did not transfer to College Park. The court explained (*id.* at A–10; citations omitted):

> In the circumstances of this case, * * * the Board is not required to affirmatively demonstrate that each discharged employee would have transferred absent his or her illegal termination. The Board may rely on the presumption that discriminatorily discharged employees remain on with the company. * * * The policy that gives rise to this presumption of continued employment is that a violator of the Act should not be allowed to benefit from its wrongdoing by placing the difficult burden on the Board of proving how individual employees might have acted under hypothetical circumstances.

ARGUMENT

As petitioner concedes (Pet. 9), it is settled law that, absent unusual circumstances, a union enjoys an irrebuttable presumption of majority support for one year following certification. *Brooks* v. *NLRB*, 348 U.S. 96, 98–99 (1954).[5] Petitioner contends, however, that the fact that a majority of the employees at College Park

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[5]As the Court noted in *Brooks* (348 U.S. at 98–99; footnotes omitted), unusual circumstances have been found where "(1) the certified union dissolved or became defunct; (2) as a result of a schism, substantially all the members and officers of the certified union transferred their affiliation to a new local or international; (3) the size of the bargaining unit fluctuated radically within a short time." And see *NLRB* v. *Lee Office Equipment*, 572 F.2d 704, 706 (9th Cir. 1978) (abandonment of union by employees not unusual circumstances).

are not from East Point constitutes unusual circumstances justifying its withdrawal of recognition. There is no merit to this contention.

Petitioner cites no case where similar facts have been considered "unusual circumstances" sufficient to overcome the *Brooks* presumption. None of the cases that petitioner relies upon deal with the question of a bargaining obligation after a relocation during the certification year.[6] This factual distinction, ignored by petitioner, is crucial.

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[6] *Westwood Import Co.*, 251 N.L.R.B. 1213 (1980) (Pet. 9), dealt with the effect of the Board's contract bar rule, which precludes questioning majority status during the term of a collective agreement, in a relocation context. *Westinghouse Electric Corp.*, 174 N.L.R.B. 636, 637–638 (1969) (Pet. 9), not only was not a certification year situation, the case did not involve a relocation but rather a new plant where the union was required to establish its majority status. In *Coated Products, Inc.*, 237 N.L.R.B. 159, 161 (1978), enforced, 620 F.2d 289 (3d Cir. 1980) (Pet. 9), the relocation occurred more than 10 years after the expiration of the certification year. *NLRB* v. *Burns International Security Services*, 406 U.S. 272 (1972), and *NLRB* v. *Pepsi-Cola Bottling Co.*, 613 F.2d 267 (10th Cir. 1980) (Pet. 9–10), are successorship cases wherein the successor employer has no obligation to assume the predecessor's bargaining obligation where it does not have a majority of the predecessor's employees. They do not deal with the obligation of the same employer in a relocation context.

The cases upon which petitioner relies (Pet. 8 n.6, 10–18) for its assertion of a conflict among the circuits are similarly inapposite because none involve a certification-year relocation. In *Cooper Thermometer Co.* v. *NLRB*, 376 F.2d 684 (2d Cir. 1967), the relocation occurred after the parties had enjoyed a 30-year bargaining relationship. In *Fraser & Johnston Co.* v. *NLRB*, 469 F.2d 1259 (9th Cir. 1972), the unions involved had been representing employees for 25–30 years at the time of the relocation. Finally, in *NLRB* v. *National Car Rental System*, 672 F.2d 1182 (3d Cir. 1982), the bargaining relationship was over 10 years old when the employer relocated its facility.

During the certification year it is immaterial whether a union in fact retains its majority status; as a matter of law the union's majority status is irrebuttably presumed. *Brooks* v. *NLRB*, *supra*, 348 U.S. at 98; *NLRB* v. *Burns International Security Services*, *supra*, 406 U.S. at 279 n.3. See also *NLRB* v. *Louisiana Bunkers, Inc.*, 409 F.2d 1295, 1299 (5th Cir. 1969). After the certification year passes, however, the presumption becomes rebuttable and loss of actual majority status will abrogate the employer's bargaining obligation. See, *e.g.*, *Brooks* v. *NLRB*, *supra*, 348 U.S. at 104; *NLRB* v. *Burns International Security Services*, *supra*, 406 U.S. at 279 n.3. Cases holding that an affirmative showing of continued majority status is required in a post-certification-year relocation are thus plainly inapposite when, as here, the relocation occurs during the certification year period when the union's majority status cannot be contested.

Petitioner's contention (Pet. 18–20) that "the Board abused its discretion" by issuing a bargaining order when a majority of the employees at College Park might not support the union is therefore precluded by *Brooks* v. *NLRB*, *supra*. Lack of majority status during the certification year does not defeat the employer's obligation to bargain with the certified union.[7] Moreover, to the extent that petitioner is relying on the

[7] Thus, as the court below observed (Pet. App. A–12 n.11), the only real issue in the case is "whether in the light of all the facts the bargaining unit remains the 'same' or is now a 'different' one." Accord: *NLRB* v. *Louisiana Bunkers, Inc.*, 409 F.2d 1295, 1299 (5th Cir. 1969) (relocation during certification year). Here, the relocation resulted in no significant changes in the bargaining unit; the employees retained the same job classifications and continued to do essentially the same work, and the moderate increase in bargaining unit size from seven to eleven employees did not present the sort of "radical fluctuation" necessary to justify a refusal to bargain under the standard enunciated in *Brooks* v. *NLRB*.

right of its employees to reject representation, it is relying on a right that no employee has asserted. "To allow employers to rely on employee's rights in refusing to bargain with the formally designated union is not conducive to [industrial peace], it is inimical to it." *Brooks* v. *NLRB*, *supra*, 348 U.S. at 103.

Finally, even if a showing of majority support were required, the Board and the court of appeals properly concluded that, but for petitioner's unlawful actions, the discharged union adherents would have transferred to College Park and the union therefore would have retained its majority status.[8] Contrary to petitioner's assertion (Pet. 10–18), the court of appeals properly relied on the presumption that, in the absence of evidence to the contrary, discriminatorily discharged employees remain in the bargaining unit.[9] As this Court stated in *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678, 687 (1944), an employer:

> [C]annot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority. It cannot thus, by

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[8] Absent the discriminatory discharges, seven of the eleven bargaining unit members at College Park would have come from East Point (Pet. App. A–10).

[9] The presumption applies with particular force to the facts of this case. The relocation here simply resulted in a move of petitioner's operations from one side of the Atlanta airport to the other, a distance of only 7 to 10 miles. All employees except those who were unlawfully discharged transferred to the new facility. The record, moreover, shows that one of the discriminatees later accepted a nonbargaining unit position at the new facility (Pet. App. C–57) and that at least two others subsequently applied for positions there (Tr. 998, 907). On this record, it was clearly not unreasonable to conclude that, absent the unlawful discharges, all the bargaining unit employees would have transferred.

its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will.

And see *K.B. & J. Young's Super Markets, Inc.* v. *NLRB*, 377 F.2d 463, 466 (9th Cir.), cert. denied, 389 U.S. 841 (1967). *Cf. NLRB* v. *Houston Distribution Services, Inc.*, 573 F.2d 260, 267 (5th Cir.), cert. denied, 439 U.S. 1047 (1978).[10]

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[10] Petitioner's reliance (Pet. 13–17) on *Fraser & Johnston Co.* v. *NLRB*, *supra*, and *Cooper Thermometer Co.* v. *NLRB*, *supra*, is misplaced. Neither of those cases involved employees who were ordered reinstated because they had been unlawfully discharged. In *Cooper Thermometer Co.*, *supra*, 376 F.2d at 689–690, the unfair labor practice was the employer's unlawful refusal to bargain about the relocation and the court noted that the employer did not violate the Act by not transferring the employees at issue, but only by refusing "to talk in good faith." Similarly in *Fraser & Johnston Co.*, *supra*, 469 F.2d at 1260, the employer violated Section 8(a)(5) of the Act by failing to bargain about a relocation. In those circumstances, it cannot be said that "the absence of the union's majority status at the new plant has been caused by the company's unfair labor practices" (*id.* at 1265). Moreover, in both *Cooper Thermometer Co.* (376 F.2d at 690) and *Fraser & Johnston Co.* (469 F.2d at 1265), the evidence indicated that many of the employees would not have transferred to the new facility. In *NLRB* v. *National Car Rental System*, *supra*, 672 F.2d at 1194–1195, the court did refuse enforcement of a bargaining order where employees had been unlawfully denied an opportunity to transfer to a new location. As noted above (*supra*, note 6), however, the certification year had expired there and the union's continued right to represent the bargaining unit was accordingly dependent on majority status.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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